

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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MARILYN JOHNSON,

Plaintiff(s),

v.

SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 1107, et al.,

Defendant(s).

Case No. 2:14-CV-1104 JCM (GWF)

ORDER

Presently before the court is defendant Service Employees International Union, Local 1107's ("Local 1107") motion for summary judgment. (Doc. # 17). Plaintiff Marilyn Johnson has filed a response (doc. # 24), and defendant has filed a reply. (Doc. # 27).

**I. Background**

This is an employment discrimination action arising under Title VII of the Civil Rights Act of 1964 ("Title VII"). Plaintiff, an African-American woman, alleges that during her employment, Local 1107 discriminated against her based on her race by treating her disparately from non-African American employees. She asserts that the union eventually terminated her based on her race and that any non-discriminatory basis for her termination was mere pretext. She argues that these allegations form the basis for claims under Title VII and Nevada law. Ms. Johnson's complaint also alleges claims under federal and Nevada law for discrimination based on age, national origin, and sex, for which she offered no support or argument in response to defendant's summary judgment motion.

Local 1107 hired Ms. Johnson in March 2009. Ms. Johnson organized and recruited union members for Local 1107 at hospitals in Las Vegas, NV. Originally, the union assigned Ms. Johnson to work at University Medical Center. She was later assigned to be a "floater," moving around to

1 different hospitals with various duties including training new hires. She alleges the reassignment  
2 was discriminatory.

3 Beginning in February 2011, Local 1107 initiated several disciplinary actions against Ms.  
4 Johnson related to dishonesty or incompetency. She was disciplined three times prior to her  
5 termination, twice for misuse of her paid time off. Johnson denies the truth of these allegations.  
6 She was also punished for dishonesty related to a calendar she was asked to complete. Further, the  
7 disciplinary actions included reprimand for her failure to report to her worksite, failure to meet  
8 with certain union members at certain times, failure to demonstrate competency with respect to  
9 grievance investigations, and failure to organize members around issues, recruit new leaders,  
10 support existing leaders, and grow her unit. She was eventually suspended for three days and told  
that future transgressions would result in progressive discipline, including termination.

11 In August 2011, Ms. Johnson was being investigated for conversations plaintiff had with  
12 the management staff of a third party rehabilitation facility while wearing her Local 1107 uniform.  
13 Local 1107 found that Ms. Johnson lied to its representatives and agents about the conversations  
14 she had with the staff of the third party. Plaintiff's representations to Local 1107 were inconsistent  
15 with the reports of several employees of the third party. Accordingly, Local 1107 terminated  
16 Johnson for dishonesty on September 12, 2011.

17 Ms. Johnson offers limited evidence in support of her race discrimination claim under Title  
18 VII and Nevada Revised Statute ("NRS") 613.330(1)(a), arguing that she was terminated based on  
19 discrimination against her race and that her termination for dishonesty was pretext for Local 1107's  
20 discriminatory motive. She alleges that her assignment as a floater; certain comments made by one  
21 of her supervisors; the use of Spanish language, which Ms. Johnson does not speak, by the same  
22 supervisor during some meetings; and her assignment to a purportedly unclean office are evidence  
of discrimination against her. She argues that her firing was the final act of discrimination.

## 23 **II. Legal Standard**

24 The Federal Rules of Civil Procedure provide for summary judgment when the pleadings,  
25 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,  
26 show that "there is no genuine issue as to any material fact and that the movant is entitled to a  
27 judgment as a matter of law." FED. R. CIV. P. 56(a). A principal purpose of summary judgment is  
28 "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317,  
323–24 (1986).

1 In determining summary judgment, a court applies a burden-shifting analysis. “When the  
2 party moving for summary judgment would bear the burden of proof at trial, it must come forward  
3 with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at  
4 trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine  
5 issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests.,*  
6 *Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

7 In contrast, when the nonmoving party bears the burden of proving the claim or defense,  
8 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential  
9 element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving party failed  
10 to make a showing sufficient to establish an element essential to that party’s case on which that  
11 party will bear the burden of proof at trial. *See Celotex*, 477 U.S. at 323–24. If the moving party  
12 fails to meet its initial burden, summary judgment must be denied and the court need not consider  
the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

13 If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
14 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*  
15 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing  
16 party need not establish a material issue of fact conclusively in its favor. It is sufficient that “the  
17 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions  
18 of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 631 (9th  
Cir. 1987).

19 In other words, the nonmoving party cannot avoid summary judgment by relying solely on  
20 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,  
21 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the  
22 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue  
23 for trial. *See Celotex*, 477 U.S. at 324.

24 At summary judgment, a court’s function is not to weigh the evidence and determine the  
25 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby,*  
26 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all justifiable  
27 inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is  
28 merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at  
249–50.

### 1      **III. Discussion**

#### 2            A.      *Ms. Johnson's claims for age, national origin, and sex discrimination*

3            Ms. Johnson brings claims under federal and Nevada law for discrimination based on age,  
 4            national origin, and sex. (*See* doc. # 1). The only facts she pleads with respect to those claims are  
 5            that she is female, age forty-eight, and that other females were allowed to leave early to pick up  
 6            children from school—otherwise, her complaint relies on purely conclusory allegations. (*See*  
 7            *generally* doc. # 1). She did not engage in discovery on these claims. In her opposition, plaintiff  
 8            offers neither argument, nor evidence, nor additional factual allegations in support of those claims.  
 9            Indeed, they are not addressed at all. (*See generally* doc. # 24). Defendant argues that it is  
 10           thus entitled to summary judgment on those claims. The court agrees with defendant. Local 1107  
 11           has demonstrated plaintiff cannot establish the essential elements of those claims, and Ms. Johnson  
 12           has not carried her burden to show that a genuine issue of material fact exists with respect to any  
 13           element—summary judgment in defendant's favor is therefore appropriate on these unsupported  
 14           claims.

#### 15           B.      *Ms. Johnson's remaining claims for race discrimination*

16           Local 1107 argues that plaintiff, who has engaged in negligible discovery and offers only  
 17           her own declaration and deposition in support of her claims, cannot make a showing sufficient to  
 18           establish the elements essential to a Title VII or NRS § 613.330(1)(a) discrimination claim. It  
 19           argues that Ms. Johnson has failed to create an inference that Local 1107 terminated her because  
 20           of her race. Alternatively, defendant argues that even if Ms. Johnson has established a *prima facie*  
 21           case for disparate treatment, she has failed to prove that Local 1107's rationale for her termination  
 22           was merely pretext for unlawful discrimination, warranting summary judgment in its favor.

23           In her opposition, plaintiff argues that she has alleged and offered proof of sufficient  
 24           discriminatory acts to establish a *prima facie* case of discrimination. She also claims she has shown  
 25           that the legitimate rationale for her termination was mere pretext. She argues that summary  
 26           judgment is therefore premature on her discrimination claims.

27           Under Title VII, it is unlawful for an employer “to discharge any individual, or otherwise  
 28           to discriminate against any individual with respect to his compensation, terms, conditions, or  
 privileges of employment, because of such individual's race.” 42 U.S.C. § 2000e-2(a)(1).  
 Similarly, NRS § 613.330(1)(a) makes it unlawful for an employer “to discharge any person, or  
 otherwise to discriminate against any person with respect to the person's compensation, terms,

1 conditions or privileges of employment, because of his or her race.” NEV. REV. STAT. §  
2 613.330(1)(a).

3 In response to a motion for summary judgment, a plaintiff claiming race discrimination  
4 under Title VII or NRS § 613.330(1)(a) may offer direct or circumstantial evidence that a  
5 discriminatory reason more likely than not motivated the employer, or alternatively, may proceed  
6 under the *McDonnell Douglas* analysis. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th  
7 Cir.2004); see *Apeceche v. White Pine Cnty.*, 615 P.2d 975, 977–78 (Nev.1980) (citing *McDonnell*  
8 *Douglas Corp. v. Green*, 411 U.S. 793, 802 (1973)). Under *McDonnell Douglas*, the plaintiff  
9 carries the initial burden of establishing a *prima facie* case of race discrimination. *McDonnell*  
10 *Douglas*, 411 U.S. at 802. Once the plaintiff has established a *prima facie* case, the burden shifts  
11 to the defendant to provide a legitimate, nondiscriminatory reason for the adverse employment  
12 action. *Id.* If the defendant does so, the burden shifts back to the plaintiff to prove defendant's  
nondiscriminatory reason is pretextual. *Id.* at 804.

13 A plaintiff can establish a *prima facie* case of race discrimination by demonstrating he or  
14 she (1) belongs to a class of persons protected by Title VII, (2) performed his or her job  
15 satisfactorily, (3) suffered an adverse employment action, and (4) was treated differently from a  
16 similarly situated employee not a member of the same protected class as the plaintiff. *Cornwell v.*  
17 *Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th Cir.2006). The amount of evidence  
18 necessary to establish a *prima facie* case is minimal on summary judgment and “does not even  
19 need to rise to the level of a preponderance of the evidence.” *Wallis v. J.R. Simplot Co.*, 26 F.3d  
20 885, 889 (9th Cir.1994). Rather, the evidence need only “give rise to an inference of unlawful  
discrimination.” *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

21 First, the court finds that Ms. Johnson has not put forth any direct or circumstantial  
22 evidence of a discriminatory motive with respect to her termination or her assignment to a floater  
23 position. See *McGinest*, 360 F.3d at 1122. She instead attempts to support her claims for racial  
24 discrimination by alleging a *prima facie* case for discrimination and rebutting defendant's  
25 proffered non-discriminatory basis for her termination and assignment to a floater position. The  
26 court will analyze Ms. Johnson's claims under the *McDonnell Douglas* burden shifting analysis.  
See *McDonnell Douglas*, 411 U.S. at 802.

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1                   **i.       Ms. Johnson’s termination and other discipline**

2           Here, the parties do not dispute the first and third elements. As an African American, Ms.  
3 Johnson is a member of a protected class, and she suffered an adverse employment action when  
4 Local 1107 terminated her employment. Accordingly, the court will focus on the second and fourth  
5 elements.

6           To establish the fourth element of a *prima facie* case, a plaintiff must show his or her  
7 employer treated the plaintiff differently from a similarly situated employee outside plaintiff’s  
8 protected class. *Cornwell*, 439 F.3d at 1028. Whether employees are similarly situated is both an  
9 element of the plaintiff’s *prima facie* case and evidence of pretext. *Hawn v. Exec. Jet Mgmt., Inc.*,  
10 615 F.3d 1151, 1158 (9th Cir.2010). But it is important to keep these steps separate because “[t]o  
11 do otherwise would in many instances collapse the three step analysis into a single initial step at  
12 which all issues would be resolved.” *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1344 (9th  
13 Cir.1981). At the *prima facie* stage, the plaintiff’s burden is “not onerous,” and the evidence need  
14 only “give rise to an inference of unlawful discrimination.” *Burdine*, 450 U.S. at 253.

15           Ms. Johnson has failed to carry her burden of establishing that she was treated differently  
16 from a similarly situated employee not a member of the same protected class as the plaintiff with  
17 respect to her termination. *See Cornwell*, 439 F.3d at 1028. Plaintiff has failed to offer any  
18 argument or evidence of any similarly situated employee. She does not offer evidence of any  
19 employees with materially similar disciplinary issues or roles to her own who were not terminated,  
20 nor does she even allege that such an employee exists. She instead argues that the multiple  
21 instances of discipline were not deserved, claiming that Local 1107 was either wrong in  
22 disciplining her or at fault itself.

23           Ms. Johnson fails, however, to show that other similarly situated employees were not  
24 disciplined for similar behavior. Again, Ms. Johnson has not even alleged that such employees  
25 exist. The evidence before the court, which consists only of Ms. Johnson’s own deposition and  
26 affidavit, is not sufficient to show that Local 1107 treated her differently than a similarly situated  
27 employee outside plaintiff’s protected class with respect to her termination or the progressive  
28 discipline she received prior to termination. *See Hawn*, 615 F.3d 1158. That is because she does  
not allege the existence of any similarly situated employees.

          Ms. Johnson has failed to establish a *prima facie* case for racial discrimination with respect  
to her termination or other discipline.

1                   **ii. Ms. Johnson’s assignment to a “floater” position**

2           Ms. Johnson also alleges that her “relegation” to a “floater” role was discriminatory and an  
3   adverse action, and that no other employees were assigned to such a role. (*See* doc. # 24). She  
4   argues here that similarly situated non-African Americans were not “bounced around by being  
5   transferred from hospital to hospital . . . .” (Doc. # 24-1 at 2); (*see* doc. # 24-2 at 59–61). The only  
6   evidence Ms. Johnson offers that non-African American employees were not put in floating  
7   positions is that the newly hired women whom she trained in her role as a floater were given  
8   permanent positions. (*See id.*).

9           Local 1107 argues that plaintiff was assigned to a “floater” position because she was the  
10   only employee who had the necessary skills to handle the responsibilities of a floater. Ms. Johnson  
11   admits that the similarly situated employees she offers as proof of discrimination were not  
12   similarly situated. She testified that a floater position requires a variety of skills that someone who  
13   was new to the union could not provide. (*See* doc. # 24-2 at 62).

14           As new employees, the women she trained and supervised were not materially similar to  
15   her. She also admitted she was “the only one” with hospital experience, which was necessary to  
16   complete hospital grievances as the floater position required. (*See id.* at 61–62). “Employees in  
17   supervisory positions are generally deemed not to be similarly situated to lower level employees.”  
18   *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003), as amended (Jan. 2, 2004). The  
19   new employees Ms. Johnson offers to establish the existence of similarly situated employees were  
20   not therefore similarly situated.

21           Ms. Johnson cannot therefore establish a *prima facie* case for race discrimination based on  
22   her assignment as a floater for Local 1107. Plaintiff has failed to show that similarly situated  
23   employees were treated differently with respect to her assignment as a floater. She has therefore  
24   failed to establish a *prima facie* case for race discrimination based on the assignment.

25                   **iii. Ms. Johnson’s other allegations of racial discrimination**

26           Many of Ms. Johnson’s coworkers were native Spanish speakers. Ms. Johnson alleges that  
27   her supervisor, Gricelda Mariscal, conducted some meetings partially in Spanish, knowing that  
28   plaintiff could not understand the language. She also claims that she was assigned to an unclear



1 office that smelled of urine.<sup>1</sup> She argues that Ms. Mariscal's decision to conduct the meetings in  
 2 Spanish was a discriminatory and adverse action, and that the assignment to a sub-par office was  
 3 based on her race.

4 Again, Ms. Johnson fails to offer any evidence of similarly situated employees. With  
 5 respect to her claim about meetings conducted in Spanish, she fails to identify any non-African  
 6 American, non-Spanish speaking employee who was treated differently by Ms. Mariscal with  
 7 respect to her decision about which language to conduct meetings in.

8 Similarly, she has not offered any evidence with respect to the normal assignment of offices  
 9 at Local 1107. Specifically, she has not established that similarly situated non-African American  
 10 employees were assigned to cleaner offices that did not smell of urine.

11 In fact, she has not presented any evidence of any similarly situated non-African American  
 12 employees with respect to any of her claims. The court therefore has no basis to find that Ms.  
 13 Johnson has alleged a *prima facie* case for racial discrimination under Title VII or NRS §  
 613.330(1)(a).

#### 14 **IV. Conclusion**

15 Defendant Local 1107 has demonstrated that plaintiff has failed to establish a *prima facie*  
 16 case for racial discrimination under Title VII or NRS 613.330(1)(a). Under the *McDonnell*  
 17 *Douglas* framework, defendant is therefore entitled to summary judgment on all of Ms. Johnson's  
 18 claims.

19 Accordingly,

20 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant Service  
 21 Employees International Union, Local 1107's motion for summary judgment (doc. # 17) be, and  
 22 the same hereby is, GRANTED.

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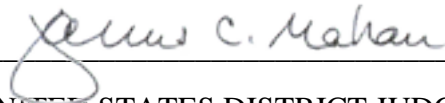
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26 <sup>1</sup> Ms. Johnson alleges that when she complained to Ms. Mariscal about the unclean office,  
 27 she was told "at least you get to use the front door." She argues that this was a racially motivated  
 28 and charged comment. The comment does not qualify as an "adverse employment action" for the  
 purposes of a racial discrimination claim and thus will not be further analyzed. The comment may  
 serve as evidence of a hostile work environment, but Ms. Johnson does not bring such a claim in  
 this action. *See Harris v Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).



1 IT IS FURTHER ORDERED that defendant Service Employees International Union,  
2 Local 1107 shall submit an appropriate judgment consistent with this order.

3 DATED March 29, 2016.

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7 UNITED STATES DISTRICT JUDGE  
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